PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Seventh Edition

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1 SOURCES OF THE LAW

1. INTRODUCTION

The subjects of study of the sources of international law and the law of treaties (treated in Chapters 27) must be regarded as fundamental; between them they provide the basic articles of the legal regime.

It is common for authors to distinguish the formal sources and the material sources of law. The former are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressers. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application. In systems of municipal law the concept of formal source refers to the constitutional machinery of law-making and the status of the rules established by constitutional law. In the context of international relations the term 'formal source' is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law. Decisions of the International Court, unanimously supported resolutions of the General Assembly of the United Nations concerning matters of law, and important multilateral treaties considered to codify or develop rules of international law, are all lacking the quality to bind states generally. In a sense 'formal sources' do not exist in international law. As a substitute, and perhaps an equivalent, there is the principle that the general content of states creates rules of general application. The definition of custom in international law is essentially a statement of this principle (and not a reference to ancient custom in municipal law).

The consequence is that in international law the distinction between formal and material sources is difficult to maintain. The former in effect consist simply of a quasi-constitutional principle of inevitable but unhelpful generality. What matters then is the variety of material sources, the all-important evidences of the existence of consensus among states concerning particular rules or practices. Thus decisions of the International Court, resolutions of the General Assembly of the United Nations, and 'law-making' multilateral treaties are very material evidence of the attitude of states toward particular rules, and the presence or absence of consensus. Moreover, there is a process of interaction which gives these evidences a status somewhat higher than mere 'material sources'. Thus neither an unratiﬁed treaty nor a report of the International Law Commission to the General Assembly has any binding force either in the law of treaties or otherwise. However, such instruments stand as candidates for public reaction, approving or not, as the case may be; they may stand for a threshold of consensus and confront states in a signiﬁcant way.

The law of treaties concerns the question of the content of obligations between individual states; the incidence of obligations resulting from express agreement. In principle, the incidence of particular obligations is a matter distinct from the sources. Terminology presents some confusion in this respect. Thus treaties binding a few states only are dubbed ‘particular international law’ as opposed to ‘general international law’ comprising multilateral ‘law-making’ treaties to which a majority of states are parties. Yet in strictness there is no fundamental distinction here: both types of treaty only create particular obligations and treaties are as such a source of obligation and not a source of rules of general application. Treaties may form an important material source, however; see section 4 below.

It is perhaps useful to remark on two other usages of the term ‘sources’. Thus the term may refer to the source of the binding quality of international law as such and also to the literary sources of the law as sources of information.

2. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

The pertinent provisions are as follows:

Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
(b) international customs as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations:

See infra, pp. 12–14.
SOURCES OF THE LAW

(5) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Article 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

These provisions are expressed in terms of the function of the Court, but they represent the practice of arbitral tribunals and Article 38 is generally regarded as a comprehensive statement of the sources of international law. Yet the Court is not described as a 'source of' sources and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources. The first question which arises is whether paragraph 1 creates a hierarchy of sources. The provisions are not stated to represent a hierarchy, but the distinction intends to give an order and in one draft the word 'successively' appeared. In practice the Court may be expected to observe the order in which they apply: (a) and (c) are the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. Source (a) is thus not primarily a source of rules of general application, although treaties may provide evidence of the formation of custom. Sources (b) and, perhaps, (c) are formal sources, at least for those who care for such classification. Source (d), with its reference as a subsidiary means for the determination of rules of law, relates to material sources. Yet none of these, such as (d), as a reference to formal sources, and Fitzmaurice has criticized the classification of judicial decisions as a 'subsidiary means'.

In general Article 38 does not rest upon a distinction between formal and material sources, and a system of priority of application depends simply on the order (a) to (d) and the reference to subsidiary means. Moreover, it is probably unwise to think of hierarchy dictated by the order (a) to (d) in all cases. Source (a) relates to obligations in any case; and presumably a treaty contrary to a custom or to a general principle part of the jus cogens would be void or voidable. Again, the interpretation of a treaty may involve resort to general principles of law or of international law. A treaty that is displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties.


5 See, E. Goulding, 'Zululand', ILR 22 (1955), 540. See also, Quidor, 133 Hague Records, 342-5; Judge Tanaka, Diss. on South West Africa Cases (Second Phase), ICJ Reports (1966), 300; Akhurst, '73 BY (1973-4), 273-85.


7 See, Judge Moreno Quintana, Right of Passage Case, ICJ Reports (1960), 90.

8 Infra, ch. 23, on jus cogens and its effects.

9 See infra, pp. 16-19.

10 Air Transport Services Agreement Arbitration, 1963, ILR 38, 182; R.I.A.A. xvi, S; Award, Pl. IV, s. 5.
3. INTERNATIONAL CUSTOM

DEFINITION

Article 38 refers to 'international custom, as evidence of a general practice accepted as law,' and Biersch23 remarks that 'what is sought for is a general recognition among States of a certain practice as obligatory.' Although occasionally the terms are used interchangeably, 'custom' and 'usage' are terms of art and have different meanings. A usage is a general practice which does not reflect a legal obligation,24 and examples are ceremonial salutes at sea and the practice of exempting diplomatic vehicles from parking prohibitions.25

EVIDENCE

The material sources of custom are very numerous and include the following:26 diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g., manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation,27 international and national judicial decisions,28 recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs,29


26 See in particular Parry, 44 Grot. Soc. (1956), 149–86; McNair, Opinion, i, Preface; Zemanek, Festschrift for Rudolf Bernhard (1993), 289–306. Custom apart from the practice of states may be influential, e.g. in the general law of the sea; cf. the Tolin (1946) P. 135; Ann. Digest (1946), no. 42.

27 Cf. the Scott (1871) A. Wallace 170.

28 The latter provided a basis for the concept of the historic hay.

The resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.

**THE ELEMENTS OF CUSTOM**

1. **Duration**

Referred to consistency and generality of a practice are proved, no particular duration required: the passage of time will of course be a part of the evidence of general consistency. A long (and, much less, an immemorial) practice is not necessary, however, relating to airspace and the continental shelf have emerged from fairly quick binding of practice. The International Court does not emphasize the time element as much in its practice.

2. **Uniformity, consistency of the practice**

This very much a matter of appreciation and a tribunal will have considerable freedom of determination in many cases. Complete uniformity is not required, but substantial uniformity is, and thus in the *Fisheries case* the Court refused to accept the existence of a 12-mile rule for bays. 18

The leading pronouncements by the Court appear in the *Asylum* case after 1931.

The party which relies on a custom... must prove that this custom is established in such manner that it has become binding on the other parties... that the rule invoked... is in accordance with a consistent and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum, and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage accepted as law...

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18. IC Reports (1951), 116 at 131. See also the *Germinal case*, ibid. 25. In fact, the examples of objections made to *Nicaragua v. United States* appear to be too rare in international practice to have given rise to such a rule.


20. IC Reports (1950), at 276-7. See also U.S. *Nationality in Morocco case*, IC Reports (1952), 200; *Ninoyah v. Colombia* (Second Phase), IC Reports (1955), 30 per Judge Kuan-Wei; *Right of Passage case* (Mexico), IC Reports (1958), 46; ibid. 62 per Judge Wellington Koo, p. 99 per Judge Spender, and ibid. 136 per Hernandez, judges for the United States; *North Sea Continental Shelf Case*, IC Reports (1959), 43. (Ibid. 66 per Judge Piddilla Nervo, ibid. 229 per Judge Leach, ibid. 246 per Judge Siremion, Nicaragua's; United States (Mexico), IC Reports (1966), p. 98, 418, 419).

21. The Court was concerned with the right to decide whether the offence was political and whether the case was one of urgency.
(c) Generality of the practice

This is an aspect which complements that of consistency. Certainly universality is not required, but the real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue. It may be that the Court in the Lotus case23 misjudged the consequences of absence of protest and also the significance of fairly general abstention from prosecutions by states other than the flag state.24 In the Fisheries Jurisdiction Case (United Kingdom v. Iceland) the International Court referred to the extension of a fishery zone up to 12 mile limit 'which appears now to be generally accepted' and to 'an increasing and widespread acceptance of the concept of preferential rights for coastal states' in a situation of exceptional dependence on coastal fisheries.25

(d) Opinio juris et necessitatis26

The Statute of the International Court refers to 'a general practice accepted as law'.27 Briefly28 speaks of recognition by states of a certain practice 'as obligatory', and Hudson29 requires a 'conception that the practice is required by, or consistent with, prevailing international law'. Some writers do not consider this psychological element to be a criterion for the formation of custom.30 But it is in fact a necessary ingredient. The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage. The essential point is surely one of proof, and especially the incidence of the burden of proof.

In terms of the practice of the International Court of Justice—which provides a general guide to the nature of the problem—there are two methods of approach. In many cases the Court is willing to assume the existence of an opinio juris on the basis of evidence of a general practice,31 or a consensus in the literature, or the previous

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23 See infra, pp. 9–10.
24 Lauterpacht, Development pp. 384–86. See also the Paquette Habana (1900), 175 US 677.
25 ICJ Reports (1956), 3 at 27–6. See also the North Sea Continental Shelf Case, ICJ Reports (1969), 4 at 42.
26 For reliance on the practice of a limited number of states see the Wimbledens (1923), PCIJ, Ser. A, no. 1. See also Fernandez v. Wilkinson, ILR, 87, 446, 455–8.
28 Italics supplied.
29 p. 61.
30 Quoted in Briggs, p. 25.
31 See Guggenheim, Etudes Savile, i. 275–80; Fischer Williams, Some Aspects of Modern International Law, 44–4. See now Guggenheim, i. 103–5. For Kelsen the opinio juris is a fiction to disguise the creative powers of the judge: see Revue internationale de la théorique du droit (1939), 253–74; and cf. Principles of International Law (1932), 307 (2nd edn., 1967), 450–1.
...universally be determined from protest and protestations. Silencing it may be that protest and protestations, other than the International mile limit, became widespread recognition of the principles which provided a basis for the jurisprudence on the principles, or the principles.

The North Sea Continental Shelf Cases the International Court was also strict in requiring proof of the opinio juris. The Court did not presume the existence of opinio juris in either of the context of the argument that the equidistance principle had become a part of general or customary law at the date of the Geneva Convention of 1958, or in relation to the proposition that the equidistance practice of states based upon the Convention had produced a customary rule. However, it is incorrect to regard the precise findings as in all respects incompatible with the view that the existence of a general practice raises a presumption of opinio juris. In regard to the position before the Convention concerning the equidistance principle, there was little 'practice' apart from the records of the International Law Commission, which revealed the experimental aspect of the principle prior to 1958.

In considering the argument that practice based upon the Convention had produced a customary rule the Court made it clear that its unfavourable reception to the argument rested primarily upon two factors: (a) the peculiar form of the equidistance principle in Article 6 of the Convention was such that the rules were not of a norm-creating nature. The Court or other international tribunals. However, in a significant minority of cases the Court has adopted a more rigorous approach and has called for more positive evidence of the recognition of the validity of the rules in question by the practice of states. The choice of approach appears to depend upon the nature of the issues (that is, the state of the law may be a primary point in contention), and the decision of the Court.

Three cases have involved the more exacting second method of approach, of which the first was the Lotus, in which the Permanent Court said:

It is necessary to be conscious that States have been conscious of having such a duty, on the other hand... there are other circumstances calculated to show that the contrary is true.

Presumably the same principles should apply to both positive conduct and abstention. Yet if the Lotus the Court was not ready to accept continuous conduct as prima facie evidence of a legal duty and required a high standard of proof of the value of opinio juris.

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character. That the Convention had only been in force for less than three years when the proceedings were brought and consequently. 

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Nevertheless, the general tenor of the Judgment is hostile to the presumption as to opinio juris and the Court quoted the passage from the Lotus case set out above. A broadly similar approach was adopted by the Judgment of the Court in the Case of Nicaragua v. United States (Merits), and the Court expressly referred to the North Sea Cases.

In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned amount to a settled practice, but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. (ICJ Reports (1969), 44, para. 773)

BILATERAL RELATIONS AND LOCAL CUSTOMS

In the case concerning U.S. Nationals in Morocco the Court quoted the first of the passages from the Asylum case quoted earlier and continued: 'In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.'

In this case the Court may seem to have confused the question of law-making and the question of opposability, i.e. the specific relations of the United States and

37 Ibid. 41-2.
38 Ibid. 43.
39 Ibid. 43-5, and see, in particular, p. 64, para. 77.
41 ICJ Reports (1986), 14.
44 Supra, p. 7.
45 Italics supplied.
The fact is that general formulae concerning custom do not necessarily begin generating the complexities of the particular case. The case concerning a Right of Passage over Indian Territory raised an issue of bilateral relations, the existence of a Real Custom in favour of Portugal in respect of territorial enclaves inland from its port of Damão. In this type of case the general law is to be varied and the practice of the special right has to give affirmative proof of a sense of obligation and part of the territorial sovereign: opinio juris is here not to be presumed on the basis of continuous practice and the notion of opinio juris merges into the principle of state consent.

THE PERSISTENT OBJECTOR

In the case of the custom resolves itself into a question of special relations is illustrated further by the rule that a state may contract out of a custom into the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states. Given the majoritarian tendency of international relations the principle is likely to have increased prominence.

THE SUBSEQUENT OBJECTOR

In the case of the the argument was that certain rules were not rules of general international law, and, even if they were, they did not bind Norway, which had consistently and unequivocally manifested a refusal to accept them. The United Kingdom admitted the general principle of the Norwegian argument here while denying that, as a matter of fact, Norway had consistently and unequivocally manifested a refusal to accept the rules. Thus the United Kingdom regarded the question as one of persistent objection. The Court did not deal with the issue in this way, but

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11 See Fitzmaurice, 92 Hague Recueil (1957, I), 106. On opportunity in general see infra, pp. 85–6. The first case itself concerned a regional custom.


17 The principle was recognized by both parties in the Anglo-Norwegian Fisheries case; and also by a prescriptive opinion of Fitzmaurice, 92 Hague Recueil (1957, I). 99–100, Waldeck, 106 Hague Recueil (1951, II), 49–50; Sonnenfeld, 101 Hague Recueil (1960, I), 43–4; Jiménez de Aréchaga, 159 Hague Recueil (1967, I), 36–9.


19 ICJ Reports (1955), 116. On which generally see infra, pp. 176ff.
however, and the ratio in this respect was that Norway had departed from the alleged rules, if they existed, and other states had acquiesced in this practice. But the Court is not too explicit about the role of acquiescence in validating a subsequent contracting out of rules. Here one has to face the problem of change in a customary regime. Presumably, if a substantial number of states assert a new rule, the momentum of increased defection, complemented by acquiescence, may result in a new rule, as in the case of the law on the continental shelf. If the process is slow and neither the new rule nor the old have a majority of adherents then the consequence is a network of special relations based on opposability, acquiescence, and historic title.

PROOF OF CUSTOM

In principle a court is presumed to know the law and may apply a custom even if it has not been expressly pleaded. In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject matter and the form of the pleadings. Thus in the Lotus case the Court spoke of the plaintiff's burden in respect of a general custom. Where a local or regional custom is alleged, the proponent must prove that this custom is established in such a manner that it has become binding on the other Party.

4. 'LAW-MAKING' TREATIES AND OTHER MATERIAL SOURCES

It may seem untidy to depart from discussion of the 'formal' sources, of which custom is the most important, and yet a realistic presentation of the sources involves giving prominence to certain forms of evidence of the attitude of states to customary rules and general principles of the law. 'Law-making' treaties, the conclusions of international conferences, resolutions of the United Nations General Assembly, and drafts adopted by the International Law Commission have a direct influence on the content of the law. A

53 See Fitzmaurice, 30 BY (1958), 246; id., 92 Hague Reports (1957, II), 90-101; Searsmann, 101 Hague Reports (1960, III), 43-7. The dictum which requires explanation, at p. 131 of the Reports, is: "In any event the ten mile rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it to the Norwegian coast."

54 See Lau-Wettin et al. v. Government of Chile, ILR 23 (1956), 79 at 710-12.

55 Since disputes are not justified by an allegation of a desire to change the law, the question of opinio juris arises in a special form and in the early stages of change can amount to little more than a hint of good faith.

56 Both forms of objection are restricted in any case by the norms of jus cogens on which see infra, ch. 23, s. 5.

57 PCIJ, see A, no. 10, p. 18.

58 Asylum case, IC Reports (1950), 276.

59 See infra, pp. 16-19.
a custom, the prosecution has a burden of proof, and the defendant has a right to a fair and open hearing. Such principles become binding through court decisions. Moreover, courts are the ultimate judges of the constitutionality of laws and regulations.

The text also mentions the concept of international law, specifically treaties, and how they create legal obligations. The text notes that a treaty becomes binding when its provisions are approved by the parties involved. It also references the Convention on the Prevention and Punishment of the Crime of Genocide as an example of a type of treaty that can influence the significance of which is not conveyed adequately by treaty obligations as material sources.

**Law-Making Treaties**

Treaties create legal obligations. Thus, a treaty for the joint carrying out of a single enterprise is not binding in the sense that its fulfillment of its objects will terminate the obligation. Law-making treaties create general norms for the future conduct of the parties in terms of legal relations, and the obligations are basically the same for all parties. The Declaration of Principles in neutrality in wartime (the Hague Conventions of 1899 and 1907), the Kellogg-Briand Pact (1928), and the Genocide Convention of 1948 are examples of this type. Moreover, those parts of the United Nations Charter which are not concerned with constitutional questions concerning the structure of organs, and the like, have the same character. Such treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a giving-law creating effect as least as great as the general practice considered sufficient to support a customary rule. By their conduct non-parties may accept the provisions of a unilateral convention as representing general international law. This has been the case with the Hague Convention I of 1907 and the rules annexed relating to land warfare. Even an unratified treaty may be regarded as evidence of generally accepted rules, at least in the short run.

The text also discusses the principle issue as to what extent courts, at all, the German Federal Republic was bound by the provisions of the Convention which it had signed but not ratified. The International Court of Justice, concluding, by seven votes to one, that only the first three articles of the Convention were emergent or

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The principles on which the Court discriminated between articles included reference to the faculty of making unilateral reservations which applied to some articles but not to those which, by inference, had a more fundamental status. With respect it may be doubted if the existence of reservations of its own destroys the probative value of treaty provisions. The Court concluded, further, that the provision on delimitation of shelf areas in Article 6 of the Convention had not become a rule of customary law by virtue of the subsequent practice of states and, in particular, of non-parties. The six dissenting judges regarded the Convention as having greater potency, more particularly in generating rules after its appearance. Both in the Gulf of Maine case and in the Libya-Malta Continental Shelf case, the Chamber of the Court and the full Court, respectively, accorded evidential weight to certain aspects of the United Nations Convention on the Law of the Sea adopted in 1982 (but not then in force).

In any event, even if norms of treaty origin crystallize as new principles or rules of customary law, the customary norms retain a separate identity even if the two norms appear identical in content.84

OTHER TREATIES

Bilateral treaties may provide evidence of customary rules, and indeed there is no clear and dogmatic distinction between 'law-making' treaties and others. If bilateral treaties, for example on extradition, are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation. However, considerable caution is necessary in evaluating treaties for this purpose.

THE CONCLUSIONS OF INTERNATIONAL CONFERENCES

The 'Final Act' or other statement of conclusions of a conference of states may be a form of multilateral treaty, but, even if it be an instrument recording decisions not

83J. B. Johnson, 38 I.B. Y. (1990), 1-33. See also infra. ch. 28, on international transactions.

84 Cf. In re Mocro Aeclans, ILR 18 (1951), nn. 58; H. Trarre, ibid. 20 (1953), 366.
accepted unanimously, the result may constitute cogent evidence of the state of the customary law on the subject concerned. Even before the necessary ratifications are received, a convention embodied in a Final Act and expressed as a codification of customary principles has obvious importance.35

RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY36

The making role of organizations is considered further in Chapter 31, section 10. In general, these resolutions are not binding on member states, but, when they are concerned with general norms of international law, their acceptance by a majority constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions.37 Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the proper consolidation of customary rules. Examples of important 'law-making' resolutions are the Resolution,38 which affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal', the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes,39 the Resolution on the Granting of Independence to Colonial Countries and Peoples,40 the Resolution on Permanent Sovereignty over Natural Resources,41 and the Declaration of Principles Governing Activities of States in the Exploration and Use of Outer Space.42 In some cases a resolution may have direct legal effect as an authoritative interpretation and application of the principles of the Charter.43 In general each individual resolution must be assessed in the light of all the circumstances and also by reference to other evidence of the states on the point in issue.

35. See, e.g., Compara et al., IIIB. 24 (1957-58), 518; Memoria Opinion, ICJ Reports (1971), 47.
37. 231-234, 419-420, 71-72.
38. 231-234, 419-420, 71-72.
40. 231-234, 419-420, 71-72.
41. 231-234, 419-420, 71-72.
42. 231-234, 419-420, 71-72.
43. 231-234, 419-420, 71-72.
5. GENERAL PRINCIPLES OF LAW

Article 38(1)(c) of the Statute of the International Court refers to 'the general principles of law recognized by civilized nations', a source which comes after those depending more immediately on the consent of states and yet escapes classification as a 'subsidiary means' in paragraph (d). The formulation appeared in the compromis of arbitral tribunals in the nineteenth century, and similar formulations appear in draft instruments concerned with the functioning of tribunals. In the committee of jurists which prepared the Statute there was no very definite consensus on the precise significance of the phrase. The Belgian jurist, Baron Descamps, had natural law concepts in mind, and his draft referred to 'the rules of international law recognized by the legal science of civilized peoples'. Root considered that governments would mistrust a court which relied on the subjective concept of principles of justice. However, the committee realized that the Court must be given a certain power to develop and refine the principles of international jurisprudence. In the result a joint proposal by Root and Phillimore was accepted and this is the text we now have.

Root and Phillimore regarded the principles in terms of rules accepted in the domestic law of all civilized states, and Guggeheim, Thoul, and Versini, in their Historical Perspectives on International Law (1927), held that these rules are to be found in the international political order. The latter part of this statement is worthy ofence. It would be incorrect to assume that tribunals have in practice adopted a system of borrowing from domestic law after a consensus of domestic systems. What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. Thus, it is impossible, or at least difficult, for state practice to evolve the rules of

67 Sorenson, 10 Hague Recueil (1960, III), 16-43, 64, Les Sources, pp. 123-63; Guggeheim, Thoul, and Versini, Historical Perspectives on International Law (1927), held that these rules are to be found in the international political order. The latter part of this statement is worthy ofence. It would be incorrect to assume that tribunals have in practice adopted a system of borrowing from domestic law after a consensus of domestic systems. What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process. Thus, it is impossible, or at least difficult, for state practice to evolve the rules of

68 See the draft treaty for the establishment of an international prize court, 1907, Article 7 (general principles of justice and equity). See also the European Court for the Protection of Human Rights and Fundamental Freedoms, Art. 7 para. 2.

69 Poetsch-Verhagen (1920), pp. 330-344, 344, Sorenson remarks that the compromis formula has an inherent ambiguity which is insidious and thus allows for any rational interpretation of the proviso: 'Les Sources, p. 125.

90 Hague Recueil (1958), II, 78.

91 29.
procure and evidence which a court must employ. An international tribunal chooses, adapts and extends from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law. In practice tribunals show considerable discretion in the matter. The decisions on the acquisition of territory in the textbooks tend not to reflect the domestic derivatives on the subject of international law as originally conceived but show a remarkable degree of influence on the decisions of judges in other fora. The evolution of the rules on the state of nature on treaties is not determined by changes in domestic law. In the North Atlantic Fisheries case the tribunal considered the concept of servitude and when it refused to apply it, in some cases, for example the law relating to private rights, reference to domestic law might give uncertain results and the choice of models might reveal ideological predictions.

GENERAL PRINCIPLES OF LAW IN THE PRACTICE OF TRIBUNALS

I. Arbitral tribunals

Arbitral tribunals have frequently resorted to municipal analogies. In the Fabiani case between France and Venezuela the arbitrator had recourse to municipal public law in the assessment of the responsibility of the state for the acts of its agents, including judicial acts committed in the exercise of their functions. Reliance was also placed on general principles of law in the assessment of damages. The Permanent Court of Arbitration has applied the principle of operator interest on debts in the Russian Indemnity case. Since the original Statute of the International Court came into force in 1920, tribunals not otherwise bound by it have treated Article 38(1)(c) as declaratory of the law applicable.

II. The International Court of Justice and its predecessor

The Court has used this source sparingly, and it normally appears, without any formal reference or label, as a part of judicial reasoning. However, the Court has on occasion

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Note: The document provided does not contain a full page of text. The text appears to be a continuation of the previous page, discussing the principles and practices of international tribunals, with a focus on arbitration cases and the role of general principles of law in international disputes.

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Source: Gugenheim, Private Law, 192, Ct. V.5, 197, 198, 199, 200. Reprinted by permission of the publisher.
referred to general notions of responsibility. In the *Chorzów Factory* case, the Court observed: ‘...one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him’. In a later stage of the same case, the following statement was made: ‘...the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparations’. In a number of cases the principle of estoppel or acquiescence (preclusion) has been relied on by the Court, and on occasion rather general references to abuses of rights and good faith may occur. Perhaps the most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdictional questions. Thus there have been references to the rule that no one can be judge in his own suit, *res judicata*, various ‘principles governing the judicial process’, and ‘the principle universally accepted by international tribunals... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given...’ In the *Corfu Channel* case, the Court had recourse to *circuitumstantial* evidence and remarked that ‘this indirect evidence is admitted in all systems of law, and it is used by international decisions. In his dissenting opinion in the *South West Africa* cases (Second Phase), Judge Tanaka referred to Article 38(1)(c) of the Court’s Statute as a basis for human rights concepts and pointed out that the provision contains natural law elements. The reasoning of the Court in the *Barcelona Traction* case (Second Phase), related very closely to the general conception of the limited liability company to be found in systems of municipal law.

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101 Chorzów Factory (Undamnity Jurisdiction), PCIJ, Ser. A, no. 9, p. 31.
102 Chorzów Factory (Merits), PCIJ, Ser. A, no. 17, p. 29.
103 See the *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53, pp. 52ff, 62, 69; *Arbitral Award of the King of Spain*, PCIJ Reports (1960), 192 at 209, 213; the *Temple case, PCIJ Reports* (1962), at 23, 31, 32 (see ch. 28, s. 4). Ibid., p. 39–40. *Advisory Opinion of Judge Allen* (1982), 42, 48, where in *Sidney* the Court established the rule of law that a plea of error cannot be allowed as an element existing consent if the party advancing it contributed by its own conduct to the error.
104 e.g. the *Fire Zones* case (1930), PCIJ, Ser. A, no. 24, p. 12; and (1932), Ser. A/B, no. 46, p. 167. For references to individual judges’ use of analogies see Lauterpacht, *Development*, p. 167, n. 20, and see also PCIJ Reports (1960), 66–7, 90, 107, 136.
105 Mosul Boundary case (1925), PCIJ, Ser. B, no. 12, p. 32.
106 German Interests in Polish Upper Silesia (1925), PCIJ, Ser. A, no. 6, p. 20.
110 PCIJ Reports (1949), 18. See also *Right of Passage over Indian Territory* (Prelim. Objection), PCIJ Reports (1957), 141–2; Germain Interests in Polish Upper Silisia, PCIJ, Ser. A, no. 6 (1925), p. 19; and, on forum praetorium, infra, ch. 3, s. 9.
111 PCIJ Reports (1966), 6 at 294–9.
112 Ibid. (1970), at 33–5. See generally infra, ch. 2, s. 5.
6. GENERAL PRINCIPLES OF INTERNATIONAL LAW

The fabric may refer to rules of customary law, to general principles of law as in Article 38(2)(d) of the Statute of the International Court of Justice, and to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies. What is clear is that there has been either a categorization of the sources. Examples of this type of general principle are the 'principle of consent,' reciprocity, equality of states, finality of awards and settlements, the invalidity of agreements, good faith, domestic jurisdiction, and the freedom of the nation in any case where these principles are to be traced to state practice. However, they can only be abstractions from a mass of rules and have been so long and so generally recognized as to be no longer directly connected with state practice. In a few cases the principle concerned, though useful, is unlikely to appear in ordinary state practice.

For the subject matter of 'general principles of law' overlaps that of the present section. However, certain fundamental principles have recently been set apart as overarching principles of judges which may qualify the effect of more ordinary rules.

7. JUDICIAL DECISIONS

1. Decisions of international tribunals

Judicial decisions are not strictly speaking a formal source, but in some instances they are regarded as authoritative evidence of the state of the law, and the practical significance of the label 'subsidiary means' in Article 38(2)(d) is not to be exaggerated. A coherent body of jurisprudence will naturally have important consequences on the law.

ARBITRAL TRIBUNALS

The literature of the law contains frequent reference to decisions of arbitral tribunals. The manner of arbitral tribunals has varied considerably, but there have been a number of cases...
of awards which contain notable contributions to the development of the law by eminent jurists sitting as arbitrators, umpires, or commissioners. 117

REFERENCE TO ARBITRAL AWARDS BY THE INTERNATIONAL COURT OF JUSTICE AND ITS PREDECESSOR

The Court has referred to particular decisions on only five occasions, 118 but on other occasions 119 has referred compendiously to the jurisprudence of international arbitration.

DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE AND ITS PREDECESSOR

The Court applies the law and does not make it, and Article 59 of the Statute 120 in part reflects a feeling on the part of the founders that the Court was intended to settle disputes as they came to it rather than to shape the law. Yet it is obvious that a unanimous, or almost unanimous, decision has a role in the progressive development of the law. Since 1947 the decisions and advisory opinions in the Reparation, 122 Genocide, 123 Fisheries, 124 and Nettletobin 125 cases have had decisive influence on general international law. However, some discretion is needed in handling decisions. The Lotus decision, arising from the casting vote of the President, and much criticized, was rejected by the International Law Commission in its draft articles 126 on the law of the sea, and at its third session the Commission refused to accept the principles emerging from the Genocide case (a stand which was reversed at its fourteenth session). 127 Moreover, the

117 See e.g. the Alabama Claims arbitration (1872), Moore, Arbitrations, I. 655; and the Belting Sea Fisheries arbitration (1893), Moore, Arbitrations, I. 755. See also infra, pp. 199-40 on the Palmas Island case and pp. 403ff. on the Caneuvas case, and generally, the series of Reports of International Arbitral Awards published by the UN since 1948, and the forwarded to vol. I.

118 Polish Point Service in Danzig (1925), PCIJ, Ser. B, No. 11, p. 30 (to the PCA in the case of the Panax Funds of the California, RRG, ex. 11); the Lotus (1927), PCIJ, Ser. A, No. 10, p. 26 (to the Costa Rica Packet case, Moore, Arbitrations, II. 4948); Eastern Greenland case (1933), PCIJ, Ser. A/70, No. 53, pp. 45-6; Hague Court Reports, III, at p. 170 (to the Island of Palmas case, infra, pp. 144-5); Nettletobin, ICI Reports (1953), 118 (to the Alabama arbitration, infra, p. 34); Gulf of Maine case, ibid., 1964, pp. 302-3, 324 (by the Anglo-French Continental Shelf Arbitration, ILR, 54, 6).

119 Chorzow Factory (jurisdiction) (1927), PCIJ, Ser. A. No. 9, p. 3; Chorzow Factory (Merits) (1928), PCIJ, Ser. A, No. 17, pp. 31, 47; Fisheries case, ICI Reports (1951), 1. See also Peter Palkam University (1933), PCIJ, Ser. A/70, No. 41, p. 240 (dominant practice of mixed arbitral tribunals); Barcelona Traction case (Second Phase), ICI Reports (1970), at 40. The Court has almost uniformly to decisions of other tribunals without specific reference to arbitral tribunals: Eastern Greenland case, supra, at p. 44; Reparation for Injuries, ICI Reports (1949), 186.

120 Supra, p. 4.

121 Supra, p. 4.

122 Supra, ch. 31.

123 Supra, ch. 27, s. 3.

124 Infra. p. 176.

125 Infra. p. 19.

126 See infra, pp. 239-40.

127 See infra, ch. 27, s. 3.
Judicial Precedent and the Statute of the Court

It is not inconceivable that Article 38(1)(d) of the Statute starts with a proviso: "Subject to the provisions of Article 59, judicial decisions...as subsidiary means for the determination of rules of law." Article 59 provides: "The decision of the Court has no binding force as between the parties and in respect of that particular case." Lauterpacht argued that Article 59 does not refer to the major question of judicial precedent but to the particular question of intervention. In Article 63 it is held that, if a third State, acting in the right of intervention, the construction given in the judgment shall be equally binding upon it. Lauterpacht concludes that "Article 59 would thus serve to state directly what Article 63 expresses indirectly." Beckett took the view that Article 59 refers to the actual decision as opposed to the legal principles on which it rested. However, the debate in the committee of jurists responsible for the Statute indicates clearly that Article 59 was not intended merely to express the principle of respect but to rule out a system of binding precedent. Thus in one judgment the Court has said: "The object of [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes. In its practice, however, it has not treated earlier decisions in such a narrow spirit..."

Judicial Precedent in the Practice of the Court

Strictly speaking, the Court does not observe a doctrine of precedent, but strives nevertheless to maintain judicial consistency. Thus, in the case on Exchange of Greek and Turkish Populations, the Court referred to "the precedent afforded by its Advisory


Ibid., p. 7.


In practice the Court has been more concerned with the maintenance of judicial consistency in matters of procedure.

(1960), PCIJ Ser B, vol. p. 21. See also Peace Treaties case, ICJ Reports (1950), 84, 103, 106 (Wintzicki), (243), (dissent); South West Africa cases, ICJ Reports (1962), 328, 345; Cameroons case, 225 (1960), 27-8, 29-30, 37; Aerial Incident case, ibid. (1959), 192 (Stoudt dissent); South West Africa cases...
Opinion No. 3', i.e. the 'Wimbledon case, in respect of the view that the incurring of treaty obligations was not an abandonment of sovereignty. In the Reparation\textsuperscript{135} case the Court relied on a pronouncement in a previous advisory opinion\textsuperscript{136} for a statement of the principle of effectiveness in interpreting treaties. Such references are often a matter of 'evidence' of the law, but a fairly substantial consistency is aimed at and so the technique of distinguishing previous decisions may be employed. In the case of Interpretation of Peace Treaties\textsuperscript{137} certain questions were submitted by the General Assembly to the Court for an advisory opinion. The questions concerned the interpretation of clauses in the peace treaties with Bulgaria, Hungary, and Romania, clauses relating to the settlement of disputes concerning the interpretation or execution of these treaties. In fact the request arose from allegations against these three states by other parties of breaches of the provisions of the treaties on the maintenance of human rights, a matter of substance. The Court rejected arguments to the effect that it lacked the power to answer for an opinion. The Court said:\textsuperscript{138}

Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are such as should lead it to decline to answer the Request. In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent International Tribunal in the Eastern Carucel case\textsuperscript{139} (Advisory Opinion No. 5), when that Court declined to give an Opinion because it found that the question, put to it, was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.

... the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes.


\textsuperscript{135} I C Reports (1949), 182–3.

\textsuperscript{136} Competence of the I.C.T. to regulate, incidentally, the Personal Work of the Employer (1926), PCIJ, Ser. B, no. 13, p. 18.

\textsuperscript{137} I C Reports (1950), 65.


\textsuperscript{139} (1923), PCIJ, Ser. B, no. 5, at p. 27.
(1) Decisions of the Court of Justice of the European Communities

Several decisions of this Court have involved issues of general importance.

(2) Decisions of national courts

Article 301(4) of the Statute of the International Court is not confined to international decisions and the decisions of national tribunals have evidential value. Some decisions provide indirect evidence of the practice of the state of the forum on the question involved, whereas involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law. Writers from common law jurisdictions make frequent reference to municipal decisions, and such use is universal in monographs from this source. French, German, and Italian jurists tend to use fewer case references, while Russian jurists are even more sparing. In the recent past there has been a great increase in the availability of decisions as evidence of the law. Judicial decisions have been an important source for material on recognition of sources of international law, sovereignty, immunity, diplomatic immunity, extradition, war crimes, belligerent occupation, the concept of a 'state of war', and the law of peace. However, the value of these decisions varies considerably, and may represent a narrow national outlook or rest on a very inadequate use of the sources.

(3) Ad hoc International tribunals

They are set up by agreement between a number of states, for some ad hoc purposes, and produce valuable pronouncements on delicate issues, much depending on the state of the tribunal and its members and the conditions under which it does its work. The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, the decisions of the Iran–United States Claims Tribunal, and the decisions of the International Criminal Court for the Former Yugoslavia contain a number of significant findings on issues of law.

(4) Municipal courts and disputes between parts of composite states

The Supreme Court of the United States, the Swiss Federal Court, and the Staatsgerichtshof of the Weimar Republic have had occasion to decide disputes

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1) See Reuter, Recueil d'etudes en hommage a Guggenheim, p. 665 app. 672-85.
2) See Lauterpacht, 10 BY 1929, 65-95 (also in Coll. Papers, 239-49); Schwarzenberger, International Court, 1937, 32-4.
4) See the Journal du droit international (Chastel) and the Annual Digest of Public International Law (also the International Law Reports).
5) Stereoh the Scotia (1871), 16 Wallace 170; the Paquita Hobana (1900), 175 US 677; the Zamana 152 AC 75; Gibby v. Rodriguez (1950), ILR 18 (1951), no. 204; Laurinoff v. Government of Chile, ILR 19 (1950), 700.
7) BSRT 1929, 74-5. See e.g. New Jersey v. Delaware (1934), 291 US 361; 29 AJ (1935), 309; Labrador Fisheries case (1927); 43 TLR 289.
between members of the federal communities involved on the basis of doctrines of international law. The practice of the first of these is of importance in view of the fact that the United States has its origin in a union of independent states and this gives it an international element to its internal relations.147

(f) Pleadings in cases before international tribunals

Pleadings before the International Court contain valuable collations of material and, at the least, have value as comprehensive statements of the opinions of particular states on legal questions.

8. THE WRITINGS OF PUBLICISTS148

The Statute of the International Court includes, among the 'subsidiary means for the determination of rules of law', 'the teachings of the most highly qualified'149 publicists of the various nations' or, in the French text, 'a doctrine'. Once again the source only constitutes evidence of the law, but in some subjects individual writers have had a formative influence. Thus Gidel has had some formative influence on the law of the sea.150 It is, however, obvious that subjective factors enter into any assessment of juristic opinion, that individual writers reflect national and other prejudices, and, further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of the law.

Whatever the need for caution, the opinions of publicists are used widely. The late officers' opinions tendered confidentially to the executive in Great Britain contain references to the views of Vattel, Calvo, Hall, and others, and the opinions themselves represent the views of experts, including Harcourt, Phillimore, and Finlay.151 Arbitral tribunals152 and national courts153 make use of the writings of jurists. National courts are unfamiliar with state practice and are ready to lean on secondary sources. Superficially the International Court might seem to make little use of doctrine,154 and majority judgments contain few references: but this is because of the process of

147 See also infra, pp. 58–9.
149 This phrase is not given a restrictive effect by tribunals; but authority naturally affects the weight of the evidence.
150 Droit international public de la mer, 3 vols. (1932–4). His work is associated with the concept of the contiguous zone. See also Colombo, The International Law of the Sea 5th edn., (1967), translated into French, Italian, Russian, Spanish, German, Portuguese, and Greek.
151 See McNair, Opinions, i, Preface, iii, 402–6.
152 Particularly in the period 1973 to 1984, using Grotius, Vattel, and Dyzenbroek.
154 But see the Windhøj case (1923), PCIJ, Ser. A, no. 1, p. 28 (general opinion); German Settlers in Poland (1913), PCIJ, Ser. B, no. 6, p. 36 ('almost universal opinion'); Ioannina case (1923), PCIJ, Ser. B, no. 8, p. 33 (French text, 'one doctrine constant'); German Interests in Polish Upper Silesia (1925), PCIJ, Ser. A, no. 6, p. 20 ('the "teachings of legal authorities" the jurisprudence of the principal countries'); the Latas (1929)
9. EQUITY IN JUDGMENTS AND ADVISORY OPINIONS OF THE INTERNATIONAL COURT

Equity is used here in the sense of considerations of fairness, reasonableness, and justice, often necessary for the sensible application of the more settled rules of law. It may not be a source of law, and yet it may be an important factor in the process of decision. Equity may play a dramatic role in supplementing the law or appear intuitively as a part of judicial reasoning. In the case on Diversion of Water from the River Yalu, Judge Paredes said: "The principle that equity is equity, and stated

as a corollary that a state seeking the interpretation of a treaty must itself have completely fulfilled the obligations of that treaty. He observed that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply. In the North Sea Continental Shelf Cases, the Court had to resort to the formulation of equitable principles concerning the lateral delimitation of adjacent areas of continental shelf, as a consequence of its opinion that no rule of customary or treaty law bound the states parties to the dispute over the seabed of the North Sea. Considerations of equity advanced by Belgium in the Barcelona Traction case (Second Phase) did not cause the Court to modify its views on the legal principles and considerations of policy. In the Fisheries Jurisdiction case (United Kingdom v. Iceland) the International Court outlined the elements of an 'equitable solution' of the differences over fishing rights and directed the parties to negotiate accordingly. In the Burkin Faso-Mali case the Chamber of the Court applied 'equity infra legem' to the division of a frontier pool.

Equity, in the present context, is encompassed by Article 38(1)(c) of the Statute, and not by Article 38(2), which provides: 'This provision [para. 1, supra, p. 3] shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.'

This power of decision ex aequo et bono involves elements of compromise and calculation whereas equity in the English sense is applied as a part of the normal judicial function. In the Free Zones case, the Permanent Court, under a special agreement between France and Switzerland, was asked to settle the questions involved in the execution of the relevant provision in the Treaty of Versailles. While the Court was to declare on the future customs regime of the zones, the agreement contained no reference to decision ex aequo et bono. Switzerland argued that the Court should work on the basis of existing rights, and, by a technical majority including the vote of the President, the Court agreed with the argument. The Court said:

...even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement....

the majority of the Court expressed doubts as to the power of the Court to give decision ex aequo et bono, but it would be unwise to draw general conclusions from such combination much depended on the nature of the special agreement. In any case the felt by the Court regarded the power to decide ex aequo et bono as distinct from the civil notion of equity. However, the terminology of the subject is not well set forth in the usages of the General Act of Geneva, 1929.278 seem to regard the power to decide ex aequo et bono as distinct from the civil notion of equity. The converse, 'equity' to mean settlement ex aequo et bono, occurs in some arbitration agreements. On occasion equity is regarded as an equivalent of the general principles of law.279

10. CONSIDERATIONS OF HUMANITY

Considerations of humanity may depend on the subjective appreciation of the judge. But, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and the use of analogy. Such criteria have obvious connections with general principles of law and with equity, but they need no particular justification. References to principles or laws of humanity appear in preambles to conventions,273 in resolutions of the United Nations General Assembly,274 and also in diplomatic practice. The classical reference is the passage from the judgment of the International Court in the Corfu Channel case,275 in which the Court relied on certain 'general and well-recognized principles', including 'elementary considerations of humanity, even more exacting in peace than in war'. In recent years the provisions of the United Nations Charter concerning the protection of human rights and fundamental freedoms,276 and references to the 'principles' of the Charter, have been used as a more concrete basis for considerations of humanity, for example in matters of racial discrimination and self-determination.277

273 See, e.g., the provisions copied in other treaties.
274 For example, the 'Hague Convention of 1907' (1922), Hager Court Reports, ii. 40, RIAA 159.
275 See, e.g., the Hague Conventions Concerning the Laws and Customs of War on Land, 1907, preambles, 'until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that in those cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and surveillance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience'. This is seen at the 'de Martens clause'. See also the draft provisions on war criminals debated at the Peace Conference (1914).
276 See, e.g., the draft provisions on the Use of Nuclear Weapons for War Purposes, 24 Nov. 1962.
277 For example, the draft provisions on the Use of Nuclear Weapons for War Purposes (1962), 24 Nov. 1962.
278 See, e.g., the draft provisions on the Use of Nuclear Weapons for War Purposes (1962), 24 Nov. 1962.
279 See generally ch. 25, s. 3.
280 In approaching the issues of interpretation in the South West Africa cases (Second Phase), I.C.B. Reports 1960, 14, the International Court held that humanitarian considerations were not decisive. See also in the Association of the Hague, 1960, pp. 125-3, 270, 294-9.
II. LEGITIMATE INTERESTS

In particular contexts rules of law may depend on criteria of good faith, reasonable-ness, and the like, and legitimate interests, including economic interests, may then be taken into account. However, legitimate interests may play a role in creating exceptions to existing rules and bringing about the progressive development of international law. Recognition of legitimate interest explains the extent of acquiescence in face of claims to the continental shelf\(^{177}\) and fishing zones.\(^{178}\) In this type of situation it is, of course, acquiescence and recognition which provide the formal bases for development of the new rules. In the Fisheries case\(^{179}\) the International Court did not purport to do anything other than apply existing rules, but it had to justify the special applications of the normal rules to the Norwegian coastline. In doing so the Court stated,\(^{180}\) "Finally, there is one consideration not to be overlooked... that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Moreover, the Court referred to traditional fishing rights buttressed by 'the vital needs of the population' in determining particular baselines.\(^{181}\)

Judge McNair, dissenting in the Fisheries case,\(^{182}\) expressed disquiet:

In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the application of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard.

This caution is no doubt justified, but the law is inevitably bound up with the accommodation of the different interests of states, and the rules often require an element of appreciation. Examples of such rules are those concerning the invalidity of treaties,\(^{183}\) excuses for delictual conduct,\(^{184}\) and the various compromises in conventions between the standard of civilization and the necessities of war.\(^{185}\)

NOTE ON COMITY

International comity, comitas gentium, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, mutual

177 See infra, pp. 205 ff.
178 See infra, p. 198.
179 See infra, pp. 176 ff.
180 RE Reports (1951), 137. See also at p. 128: 'In these latter regions the inhabitants of the coastal zone derive their livelihood essentially from fishing'. See also Fitzmaurice, 30 BY (1955), 69-70; id. 92 Hague Convention (1957), 112-16; and Thriftway, 61 BY (1990), 17-29.
181 ICJ Reports (1955), 145.
182 p. 169.
183 See ch. 27, s. 1.
184 See ch. 21, s. 13.
As from the meaning just explained, the term 'comity' is used in four other ways: (1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and source of, particular rules of conflict of law; and (4) as the reason for and source of a rule of international law.

NOTE ON CODIFICATION

Narrowly defined, codification involves the setting down, in a comprehensive and organised form, of rules of existing law and the approval of the resulting text by a law-determining agency. The process in international relations has been carried out by international conferences, such as the First and Second Hague Peace Conferences of 1899 and 1907, and by groups of experts whose drafts were the subjects of conferences sponsored by the League of Nations or the American states. However, the International Law Commission, created as a subsidiary organ of the General Assembly of the United Nations, has had more success than the League bodies. Its membership combines technical qualities and experience of government work, so that its drafts are more likely to adopt solutions which are acceptable to governments. Moreover, its membership reflects a variety of political and regional standpoints and thus its agreed draft provides a realistic basis for legal obligations. In practice the Commission has maintained a strict separation of its tasks of codification and 'progressive development of the law.' Its work on various topics, including the law of the sea, has provided the basis for successful conferences of plenipotentiaries and the resulting multilateral conventions.

111 C.f. supra Art. 36 of the Vienna Conv. on Diplomatic Relations, 1961.
113 The courts and American courts often use the term thus, e.g. the Parliament Bldg (1880), 5 P.D. 197, 214. 266, 270.
114 See Hullvors, Commentaries (2d ed., 1879), iv, pass. 1.
116 The Chelmon (1913) AC 485, 502, per Lord Wright; Re A.B. (1941) 1 KB 454, 457; Knipjan v. Tai Agency, 344 F2d 247, 250, per Cohen, J.
117 See International Law in the Last One Hundred Years: Views from the International Law Association (1997), 1-18.